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to harmonize and indeed to success in public matters, so that he was deservedly beloved by all.

"The funeral takes place to-morrow (Thursday), when the remains will be interred in a vault in the Lady Chapel of Melford Church."

Yours sincerely,

ROBERT C. WINTHROP.

CHARLES DEANE, Esq., LL.D.

Mr. Quincy was appointed to prepare a Memoir of Mr. Sprague; and Mr. Foote, one of Dr. Walker, for the Society's Proceedings.

### MARCH MEETING, 1875.

A stated monthly meeting was held on the 11th instant at 11 o'clock A.M., Vice-President ADAMS in the chair.

The Recording Secretary read the record of the preceding Meeting, which was approved.

The Librarian read his list of donors to the Library for the past month.

The Corresponding Secretary read a letter of acceptance from Professor C. F. Dunbar.

The Chairman reported a recommendation from the Council to transfer the following names from the Corresponding to the Honorary list,—namely, the Rev. Leonard Woods, D.D., LL.D.; David Masson, LL.D.; John Forster, LL.D.,—and the recommendation was unanimously adopted.

The Hon. Charles Devens, Jr., was elected a Resident Member.

Messrs. Saltonstall, A. T. Perkins, and Smith were appointed a Nominating Committee, to report a list of officers for the Annual Meeting.

Messrs. Lawrence, Mason, and W. Amory were appointed a committee on the Treasurer's account.

The Chairman laid before the Society the following letter:—

*To the President of the Massachusetts Historical Society.*

SIR,—The Inhabitants of the Town of Concord, Massachusetts, cordially invite a delegation from the Massachusetts Historical Society to be present as their guests at Concord, on the nineteenth of April, 1875, and to join with them in celebrating the Centennial Anniversary of the opening of the Revolutionary War.

E. R. HOAR,	} <i>Committee of Invitation.</i>
R. W. EMERSON,	
GEORGE HEYWOOD,	

Whereupon it was *Voted*, to accept the courteous invitation on behalf of the inhabitants of the Town of Concord; and that the Council be requested to represent the Society as delegates on the occasion.

DR. QUINT said, — In these times of centennials of Revolutionary events, it is well to be accurate in our statements. I notice that some reputable newspapers have fallen into the error of regarding the Salem North Bridge affair, of February, 1775, as the first armed resistance to Great Britain. It is, of course, scarcely necessary to remind any one present of the first affair at Great Island, below Portsmouth, N. H., when, on the 14th of December, 1774, a party moved by beat of drum in the streets of Portsmouth, with reinforcements from neighboring towns, scaled the walls of Fort William and Mary, confined the small garrison, and carried off ninety-seven barrels of powder, most of which was used at Bunker Hill. It may not be fresh in mind, however, that the assault was resisted by both artillery and musketry fire, and that the patriots not only “gave three Huzzas,” but also deliberately “hailed down the King’s colours.” A vain tradition has obtained some circulation, that this attack was a night surprise. It was at three o’clock in the afternoon, and the commander of the fort had had three hours’ notice of the approach. The commander’s official report, as well as three or four letters of Governor Wentworth, and an account of the seizure given in the Portsmouth paper of a few days’ later date, are sufficient evidence.

Ebenezer Bennett was the last survivor of the Durham party, which was led by John Sullivan. The veteran died in 1851; but I heard a statement of his recollections taken from his own lips, and the traditionary spot where the powder was hidden (under the pulpit of the old Durham meeting-house) was familiar to me in boyhood.

Unless some earlier affair appears, I think that this capture must be regarded as the first armed resistance.

On motion of Mr. WHITMORE, it was *Voted*, that the Committee on the Sewall Papers report at the next meeting the probable cost of transcribing so much of those papers as will be required to make one printed volume.

Mr. NORTON exhibited a cast of the face of Cromwell, in plaster, recently taken from the original mask, and thought by Mr. Carlyle, from whom Mr. Norton read an interesting letter respecting it, to be the best likeness now extant of the Protector.

Mr. T. C. AMORY called the attention of the Society to a

new serial of the Proceedings on the table, which contained the letter of Luzerne to Vergennes, relating to General Sullivan. He hoped the letter would be read with care, believing as he did that the inferences which have been drawn from it by the historian are unwarrantable.

Mr. WHITMORE referred to some letters recently published in "The St. Chrysostom's Magazine" in New York, purporting to be written from Boston, by the Rev. Robert Ratcliffe, the first Episcopal minister in Boston, — saying he thought there were good reasons for doubting the genuineness of those letters.

Dr. QUINT stated that he had made a complete copy of "Pike's Journal," in the Society's Library, with some notes to it, for publication in the Society's Proceedings, and he would place his copy in the hands of the Committee of Publication.

Mr. ADAMS exhibited a copy of an oration *professing* to have been delivered by Samuel Adams in Philadelphia, August 1, 1776, republished in London, from a Philadelphia imprint. The existence of such a pamphlet had been well known; but Mr. Adams said there was no evidence that Samuel Adams ever delivered such an oration, nor had there ever been discovered a copy published in Philadelphia.

The Cabinet-keeper communicated a gift of a piece of glass once forming part of a window in a house in the town of Wilmington, Mass., on which was inscribed, with a diamond or some other hard substance, these words: "August 2, 1769, the infamous governor left our town." The gift was made by Dr. Samuel A. Toothaker, of North Reading, formerly a resident of Wilmington. The inscription is supposed to refer to Governor Bernard.

Letters from the President of the Society had been received by the Recording Secretary dated at Cannes, 19th and 30th January, and 5th February, — the first containing a slip from the *Journal des Débats*, noticing the decease of our distinguished Corresponding Member, "M. d'Avezac, Membre de l'Institut, Président Honoraire de la Société de Géographie," who died on the 14th of January, at his own house in Paris, Rue du Bac, 42.

Professor WASHBURN read the following paper discussing a recently mooted question as to whether the Colony laws enacted under the first Massachusetts charter were repealed by the vacating of the charter: —

*Did the Vacating of the Colony Charter annul the Laws made under it?*

I propose to tax the indulgence of the Society with some remarks bearing upon the question whether the vacating of the Colony Charter

in 1684, by a decree in the English Chancery, annulled the statutes which had been enacted under it, or whether the adoption of the Province Charter of 1691 had that effect? The question, indeed, has no practical importance, except from the historical interest which surrounds it; and the occasion for its discussion has grown out of the progress of the work now going on under the charge and editorial labors of two of our honored associates, whereby the public are to be put in possession of a complete collection of the Province Laws of Massachusetts.

A writer in the Boston "Globe," in noticing the second volume of this work, takes occasion to remark that "there has been no general repeal of the provincial statutes, whereas, of the colonial statutes, it was the law of the day, and so regarded at the time, by everybody on both sides of the Atlantic, and for a century afterwards, that by the arrival of the Province Charter, after the repeal of the Colonial Charter, the statutes passed by the colonial legislatures had become annulled." The writer, it will be perceived, ascribes this effect "to the arrival of the Provincial Charter;" and he adds: "This view of the subject was expounded, by President John Quincy Adams, historically and constitutionally, in his discourse on education at Braintree on the 24th October, 1839."

If it were true that the question had been settled by so high and competent an authority as that which is cited by the writer, it might seem presumptuous to treat it as an open one. But the language of the discourse referred to hardly seems to warrant such an assumption. It is this: "By the vacation of the charter, all the preceding colonial laws were *understood* to have been superseded with it." This is all that he says upon the subject; but, instead of being a judgment formed, it was but repeating the popular impression, without stating or examining the grounds upon which it rested. That such an impression prevailed with many in the community, is, undoubtedly, true. But I propose to ask you to look at the point historically, and see if there is any thing in the transaction itself, or in the action of the people through their representatives, which could justify the assumption that it worked such an effect, or that this was conceded by the people of Massachusetts at any time after the dissolution of the old charter?

Let us, in the first place, see what powers of government, as to making and administering laws, were conferred upon the people of Massachusetts by their Colony Charter. They were made a corporation consisting of a Governor, Deputy-Governor, Assistants, and the Freemen of the Colony. The freemen, acting with the Governor and at least six Assistants, might choose freemen, and elect such officers as they should see fit, "for the ordering, managing, and despatching of the affairs of the said Governor and Company and their successors, and might make *laws* and *ordinances* for the good and welfare of the Company, and for the *governing* it, and ordering of the said lands and plantations, and the people inhabiting and to inhabit the same, as to them shall be thought meet, so as such laws and ordinances be not contrary or repugnant to the laws and statutes of their own realm of England";

"giving," thereby, in the words of Judge Story, "full legislative power." (1 Const. 48.)

Under this power the Colony allotted and conveyed lands to individuals, beginning as early as May, 1629. In 1641, an ordinance took from the State or sovereign the property in the shore or lands lying between high and low water mark upon the borders of the sea, and gave it to the conterminous owners of the upland, to which I refer here for reasons hereafter mentioned. Towns were also created with sundry important municipal powers and privileges, so that when the charter was revoked there were seventy-five of these municipalities in Massachusetts, and seventeen in Plymouth, and sixty thousand inhabitants had then been collected under this form of government in Massachusetts alone. What should be classed as crimes and what should be their punishment, by whom marriages should be celebrated, what should be the privileges of freemen and who should share them, the founding and establishing a system of free schools, and the adoption and promulgation of a Body of Liberties answering to a Bill of Rights, were among the acts of colonial legislation under which a body politic had grown up in the enjoyment of what was symbolized by these and kindred laws. It was while in the enjoyment of these privileges that a decree was rendered in the English Chancery, without any opportunity on the part of the Colony to be heard, by which, in the language of the Province Charter, the patent or charter of Charles I. was "cancelled, vacated, and annihilated."

The inquiry which now presents itself is, What effect, if any, did this action of the Court of Chancery have upon the existing laws of the Colony? As we pursue this inquiry, it may be well to bear in mind that the people of the Colony never regarded the judgment vacating their charter as valid, for the reason already mentioned, that they had had no opportunity to meet the charges upon which it was rendered. And it may be inquired, if it had the effect to annul these statutes, where are we to find the laws by which the people were governed between 1684, when the judgment was rendered, and 1692, when the new charter went into effect? If the Colony laws were annulled, the condition of the people would have been far worse than if they had been conquered by an enemy, and a new government been instituted over them. Such a conquest would not, of itself, have repealed any of the existing laws, nor changed the titles or rights of property in the lands of the citizens. (Montesq. B. 10, c. 3; Wheat. pt. 4, c. 2, § 5; 12 Peters, 436; 1 Kent, 178 m.) And as for the common law which the colonists brought with them from England (1 Mass. Rep. 59; 2 do. 534), it is difficult to imagine how it could have been affected by the revocation of the charter, since it derived its force and vigor from a source as high as the charter itself.

If we refer to writers upon the subject, with a very few exceptions, they speak of those colonial laws as still in force, so far as they bear upon the present condition of the people of the Commonwealth. Mr. Dane regards the ancient colonial statutes as being still important, "as they make parts of our titles." (6 Abr. 537.) And when speaking

of the ordinance in respect to the "flats," of which I have spoken, he says: "It never was denied on the King's part, by him or any of his officers or Governors of the Colony, that that law had force. On the contrary, all parties recognized it and practised upon it as a proper and valid law." Judge Sullivan, in his treatise on our Land Titles, regards the law here spoken of as having been, practically, in force ever since 1641. (p. 285.) There is no doubt, however, that opinions have at times prevailed in the community that the colonial statutes were annulled by abrogating the charter. Thus we find in one place the judges of our court, when speaking of the sources of our common law, using this language: "To these may be added some ancient usages, originating, probably, from laws passed by the legislature of the Colony of the Massachusetts Bay, which were annulled by the repeal of the first Charter." (2 Mass. Rep. 534.) And C. J. Parsons, in speaking of the ordinance in relation to the "flats," already mentioned, says: "This ordinance was annulled with the charter by the authority of which it was made" (6 Mass. R. 438); and in another case he speaks of an ordinance having "expired with the first charter." (7 Mass. R. 20.)

I shall have occasion to cite from other writers before I close; but I may remark, in passing, that I nowhere find any ground stated upon which such an assumption can rest, nor any reason offered for adopting it. It seems to have been accepted as a traditional dogma, coming down from the time of Andros, who assumed to act upon it in his iniquitous proceedings as Governor of the Colony. Sullivan says: "The charter being vacated, he claimed all the lands of which the Colony was formed as the right of the Crown. Those which had been granted he considered as having already escheated to the sovereign power, and demanded of the occupants that they should receive new grants upon such conditions, and under such fines, as he should choose to impose. The land not granted, he disposed of as he pleased, without control." (p. 54.) And in the famous trial of the Rev. Mr. Wise, in 1687, one of the judges told the prisoner, "You have no more privileges left than not to be sold as slaves." And Dr. Palfrey gives what he calls the *theory* of Andros's government, that "in English law every right, privilege, and immunity which had been founded upon the charter, fell with the charter." (3 Hist. 513.) This, it will be remembered, extended to the titles of lands. But I do not find that the people of the Colony, by any act of their own or that of their officers, recognized a doctrine so hostile to every principle upon which their government had been founded and built up. Nor can it escape observation that no such consequences as are here presented as having resulted from the abrogation of the charter, were supposed to have followed the changes and overthrow of the successive governments at home, when the royal power which granted the charter was subverted, and a Commonwealth established upon its ruins, followed by a restoration of the Crown, and the radical changes brought in at the Revolution of 1688, all of which occurred during a period of forty years of the life of the Colony. But if the statutes which depended upon the charter were, in fact, annulled by its being abrogated, why was not the

charter itself annulled by the abrogation of royal power from which it proceeded? Besides, it would be doing violence to the well-settled doctrines of the common law to hold that a citizen might be deprived of his private vested rights of person or property by a judgment of court, to which he was no party, and had no opportunity to be heard in his own defence.

The notion which appears to have prevailed, to some extent, that such was the effect of the judgment against the Colony, may be traced, I apprehend, to two causes, — a disposition on the part of Andros to crush the spirit of the colonists, and overthrow the policy which they had pursued in Church and Commonwealth, and, what is more to the point, a failure to discriminate between abolishing the means by which the laws were administered and enforced, including courts and civil officers, and abolishing the laws themselves.

The charter was vacated in October, 1684, and the Colony received formal notice of the judgment in July, 1685; but the legislature continued to act in pursuance of a proclamation of the King "that all *persons* in authority should continue to exercise their *functions*" till May, 1686, a week before Dudley took possession of the government. But, so far from their records showing any evidence that they regarded themselves as without laws or charter privileges, their last act was to appoint a committee "for the repository of such papers on file with the Secretary as refer to our charter and negotiations from time to time for the security thereof, with such as refer to our title to our land, by purchase of Indians or otherwise." It is a little remarkable, if the statutes of the Colony had been thus annulled, that Dudley and his Council were not clothed with legislative power, although they were made a court of record, which seems to assume that there were still laws to be administered. (3 Palf. Hist. 480-485.)

So far as he did act, it would seem that he recognized the old laws as in force; for we are informed by Chalmers (p. 418) that he and his Council *declared in force* the ancient ordinances of the General Court, and that the laws and customs of the Colony, with its church, both in worship and discipline, continued the same. Dudley's brief administration was followed by the arrival of Andros, in December, 1686. His commission was very broad, giving him and his Council authority to "make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and good government" of the territory over which he was appointed Governor, "and of the people and inhabitants thereof." But these laws were to be transmitted to the King within three months for allowance or disapproval. He was authorized to hold pleas of the Crown and courts of judicature. And all proceedings then pending were to be confirmed "as if such courts had acted by a just and legal authority." (7 Mass. Hist. Soc. Coll., 3d ser. p. 140.) He and his Council issued a proclamation "that all officers, both civil and military, should be continued in their places of trust, and that the *laws*, not repugnant to the laws of England in the several Colonies, should be *observed* during his Excellency's pleasure." (8 Mass. Hist. Soc. Coll., 2d ser. p. 183.)



The only act of this legislative body in *reviving* any of the old Colony laws which I have found, was one relating to "rates, duties, and imposts" (3 Palf. Hist. 520), leaving one naturally to infer, that the laws which they did not see fit to change or amend, remained in force or "observed" as before. And this seems to be confirmed by following out what was done at the resumption of the charter, after the deposition of Andros, when the Convention of the Governor, Council, and Representatives of the Colony, in June, 1689, "declared that all the laws made by the Governor and Company of said Colony, that were in force on the 12th of May, 1686, except any that are repugnant to the laws of England, *are* the laws of this Colony, and *continue* in force till further settlement, to which all inhabitants and residents here are to give due obedience." (See 9 Gray Rep. 517.)

Thus far it is difficult to perceive what statutes or system of laws could have been referred to as something to be *continued, observed, &c.*, as being still in force, other than the very Colony laws which it is assumed had been *annulled* by a revocation of the charter. Such seem to have been the views of the legislature of 1812, and of the commissioners then appointed "to collect the charters and the public and general laws of the late Colony of Massachusetts Bay." These Commissioners, Nathan Dane, William Prescott, and Joseph Story, state that "the Colony laws passed between 1672 and the charter of William and Mary were found to be generally *in addition* to the former Colony acts," which is not easily reconcilable with the idea that these laws had been annulled, and had ceased to be a thing which could be *added* to.

My object in this is to see, if I can, whether the people or the government of Massachusetts ever *acted* as if they supposed their laws had been annulled by the loss of their charter. Hutchinson, it is true, treats this as an historical fact, when he says, "After vacating the Colony laws under the old charter, by the publication of the new charter, there was room to *question* what was the rule in civil and criminal matters, and how far the common law and what statutes took place." (2 vol. 13.) So Mr. Barry, when speaking of the organization of the government under the new charter, says: "At once the question arose, and a serious question it was, how far that instrument extended, in its effect, upon the laws which had been enacted under the Colonial Charter. Obviously if it invalidated all these laws, a new code must be framed, or the old code revived. Accordingly, at the first session of the General Court, an act was passed confirming the former laws until the following November." The terms of this act did disclose that all local laws of the late Governor and Company of Massachusetts Bay "do remain and continue in full force" until the next November. But if the revival of these statutes depended upon this act of the provincial legislature, it will be found to fail altogether, since this very act was itself annulled by the Crown (1 Prov. Laws, 100; 9 Gray Rep. 518), and I nowhere find it re-enacted or revived. It is easily to be ascribed to the formal recognition of laws, made under one organization of the government, as continuing to exist under a new

one, as was done in the instances already mentioned, and was repeated when the Constitution of Massachusetts was framed (ch. 6, § 6), declaring that "all the laws which have heretofore been adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall remain and be in full force," &c., which clearly embraces the common law as well as the statutes then in force. Nor was it ever pretended, that I ever heard of, that these statutes, much less the common law, would have been annulled by adopting this constitution, if no such clause had been inserted in it. It seems, at best, to have been a mere declaratory act, affirming an existing truth in legislation. It was not deemed necessary, I believe, when the General Court in May, 1776, abrogated the style and authority of the Crown, and took that of "the Government and People of Massachusetts Bay." And it is hardly to be presumed that the same people who made this change, and acted upon it for more than four years, should have thought it to be necessary to insert a clause in their constitution to give validity and effect to the laws which "the government and people" had been making in the mean time.

If we look to the Province Charter itself, I can find nothing in its phraseology which seems to suggest any necessity to re-enact or revive any prior laws, in order to secure to the people any of their rights of person or property. It is a matter of historical truth that a great jealousy prevailed in some who had an influence in the English politics, against the free *tenure* under which, by the Colony Charter, the people of Massachusetts held their lands. This feeling was especially strong on the part of Andros and his supporters. (Sullivan's Land Tit. 55.) But the new charter declared that all lands which had been granted by any General Court formerly held, should "be hereafter *held* and enjoyed according to the purport and intent of such respective grant."

It recognized no occasion to renew old grants in order to *revive* titles. It confirmed the *tenure* by which lands were to be held. Nor does it anywhere contemplate any occasion to re-enact or resuscitate laws which had before existed. And Chalmers, when speaking of the effect upon the people of the Colony of the change in their charter, says the new Governor, Sir William Phipps, was received with sorrowful pomp in May, 1692. "Yet the change of rulers made little alteration in the government. Nearly the same persons continued in power, pristine customs remained, and, what was of still greater influence, the ancient habits of an unmixed people still urged their pursuits." (Hist. 235.)

The conclusion to which these considerations lead us, that the rescinding of the charter had no effect upon the existing laws except such as derived their immediate force and validity from that instrument, — such, for example, as created the powers and duties of courts and civil officers, — will, I think, be sustained by the published opinions of some of our most eminent and learned jurists.

The commission to which I have already alluded, appointed to collect the charters and the public laws of the late Colony and Province, in carrying out their work, profess to have reference to the clause of

the constitution above quoted, continuing in force these Colony laws, and give us nearly two hundred pages of proper Colony laws which were published by the legislature as entering into and forming a part of our present jurisprudence. No copy of the "Body of Liberties" of 1641 was then accessible to these commissioners. But one was afterwards discovered by the late Hon. Francis C. Gray, and published by him, together with an account of the several editions of the Colony laws which had been printed from time to time. He was a man of great learning and thorough research, but he nowhere intimates that these laws had been annulled, but, on the contrary, remarks that "the discovery of the 'Body of Liberties' may have an important bearing on law-suits now pending and involving the title to a great amount of property." (8 Mass. Hist. Coll., 3d ser. p. 215.)

I have spoken of a Colony ordinance by which the property in the shore or flats along the borders of tide-waters was transferred from the Crown or State to the riparian owners of the lands to which they are adjacent, and which was assumed by C. J. Parsons to have been annulled by the revocation of the charter, as has been stated. The question has since been revised by the late and present Chief Justices of the Supreme Court, in the light of whatever discoveries had been made by more recent researches into colonial affairs. And it is remarked by C. J. Gray, that "There was nothing in the repeal of the Colony Charter, or in the Province Charter, or in any intermediate proceedings, to reduce Massachusetts to the condition of a conquered country, in which, alone, has it ever been pretended that private rights are affected by a change in the form of government." (9 Gray's Rep. 518, *n*.)

C. J. Shaw, in an earlier volume of the reports (7 Cush. Rep. 76), when speaking of what had been said by C. J. Parsons upon the subject, says: "The strict correctness of this remark may, perhaps, be doubted, even though the decree in Chancery of 1685, by which the charter was adjudged forfeited, were regular and valid, which we believe has never been admitted here. In general, a revolution or change in the form of political government, does not annul the municipal laws regulating property, or divest rights of property acquired under them. If the remark was intended only to intimate that the *jus publicum*, the right of governing, controlling, and regulating the sea and sea-shores, and the powers and prerogatives of the King for the protection of public rights, which had been transferred to the Colonial Government by the charter, would be taken away by a valid revocation of the charter without affecting private rights already vested, it may be admitted to be correct." But this course of reasoning negatives the idea of a general annulment of the Colony statutes. And a writer in the 3 Am. Jur. 118, who seems to have given the matter much thought, when speaking of this dictum of C. J. Parsons, says: "It is indeed a startling proposition, that, when a charter is made for the government of a numerous, civilized, wealthy, and free community, with full powers to make laws, provide for the administration of justice, and perform all the functions of government, if

such charter is annulled, all the laws made during its existence are deemed also to be annulled with it. It would, certainly, seem not to be well founded, if it were held to extend to the annulling of vested rights, and it is difficult to perceive any limit, short of that extent, at which it would stop; for, if these rights depend upon such laws for their maintenance and support, the annulling of such laws would serve to destroy the rights depending on them. Such, it is believed, has not been the distinction when charters of this description have been repealed, or annulled."

Without detaining the Society any longer with this description, I owe them, perhaps, an apology for having wearied them with a matter whose chief interest is derived from its being a point in our early history. I was led to take it up, as a matter of investigation, from seeing the position assumed and advocated in a respectable journal of the day, by which, if well founded, the people of Massachusetts Bay, who, for more than fifty years, had enjoyed the rights and privileges of citizens of a free Commonwealth in the exercise of self-government, must have been suddenly, and without recompense or relief, rendered outlaws and aliens, with no means left for vindicating the rights which they had purchased at such a cost, and maintained at such a sacrifice. It seemed to open an inquiry which, as students in our own local history, we ought to be able to answer. And the further I have pursued it, the more strongly I have been impressed with the connection there is between the study of a people's laws and the history of their habits of thought, their social condition, and the political and economical changes through which they have been passing, and have ceased to wonder at the tenacity with which the colonists clung to their charter, and the laws to which it had given rise.